FILE COPY

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 183

RALPH HENRY CAHOON, JR., *Petitioner*

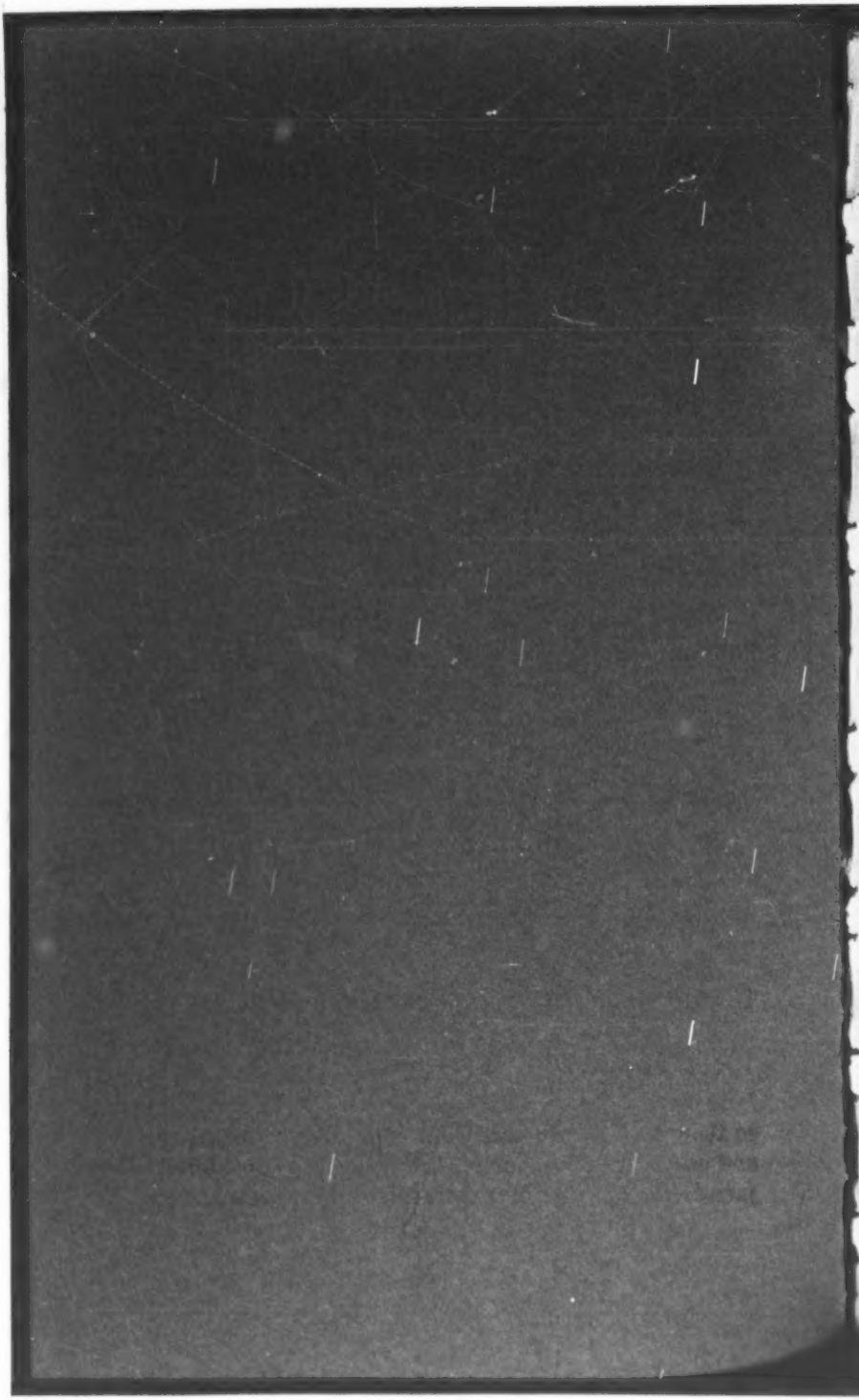
v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner's
MOTION FOR LEAVE TO FILE OUT OF TIME
Second Petition for Rehearing
and for Recall of Mandate
to Enable this Court to Reconsider Its Judgment
together with
SECOND PETITION FOR REHEARING

HAYDEN C. COVINGTON
Counsel for Petitioner



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TO THE SUPREME COURT OF THE UNITED STATES:

May it please the Court, Ralph Henry Cahoon, Jr., presents his motion for leave to file out of time a *Second Petition for Rehearing* and for a recall of the mandate so that the order of this Court denying certiorari rendered and entered on October 14, 1946, can be reconsidered before jurisdiction is lost by expiration of the present term.

The petition for rehearing attached hereto makes it clear that the administrative selective process in the *Cahoon* case had been completed prior to the issuance of the order to report for induction.

WHEREFORE petitioner prays that this Court exercise its discretion and grant him leave to file the attached *Second Petition for Rehearing* and that the mandate issued to the lower courts be recalled, and that upon consideration the petition be granted and that the order heretofore rendered be vacated. Petitioner prays for such other and further relief to which he may show himself justly entitled in the premises.

RALPH HENRY CAHOON, JR.
Petitioner

By HAYDEN C. COVINGTON
Counsel for Petitioner

Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing motion for leave to file the *Second Petition for Rehearing* is prepared and filed in good faith so that justice may be done, and not for purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner

SECOND PETITION FOR REHEARING

Comes now the petitioner, with leave of court first having been asked and obtained, and presents his second petition for rehearing, asking that the order overruling his petition for rehearing be vacated and the order denying certiorari theretofore entered be set aside, and shows as grounds:

That the Court erred in failing to hold that petitioner had exhausted all his administrative remedies when by the local board he had been found acceptable upon a preinduction physical examination and was accepted within ninety days prior to issuance of the order to report for military service, thereby qualifying him, under the rule announced by the Court in *Falbo* v. *United States*, 320 U. S. 549, *Estep and Smith* v. *United States*, 327 U. S. 114, *Dodez and Gibson* v. *United States*, 67 S. Ct. 301, for judicial review of the illegality of his classification in defense to the indictment.

OTHER GROUNDS

Cahoon was accepted upon a preinduction physical examination within ninety days from the date he was ordered to report for induction. The Brief for the United States in Opposition to the petition for writ of certiorari in this case states that Cahoon "was given a preinduction physical examination and on October 17, 1944, he was certified as physically fit for general military service.* On December 5, 1944, petitioner was ordered to report for induction on December 15, 1944 (R. 23)." (*Cahoon* v. *United States,* No. 183, October Term, 1946, Brief for the United States in Opposition, p. 5)

There is no question that the acceptance of Cahoon upon the preinduction physical examination exhausted his administrative remedies. The acceptance would have been acceptable to the armed forces because the preinduction physical examination was within ninety days before the date that petitioner was ordered to report for induction. See Petition for Writ of Certiorari, No. 800, October Term, 1946, *United States* v. *Balogh,* filed by the Government, pp. 13-18. Also reference is made to respondent's petition for rehearing in No. 800, October Term, 1946, *United States* v. *Balogh,* pp. 1-19.

For each and every one of the reasons discussed by Cahoon in his petition for writ of certiorari, his reply to the brief in opposition, his petition for rehearing and for the reasons appearing in respondent's petition for rehearing in *United States* v. *Balogh,* No. 800, October Term, 1946, petitioner asserts that the order denying the writ of certiorari should be vacated and, upon consideration hereof, the writ of certiorari granted.

* "This information has been obtained from petitioner's selective service file." *Ibid.*

Conclusion

WHEREFORE, petitioner prays, as in his petition for the writ of certiorari, that the writ be granted, that the cause be set down for argument and submission, and that the judgment of the court below be reversed and the prosecution dismissed or, in the alternative, a new trial be ordered.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing second petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner